FOR ARGUMENT

No. 89-98

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HAROLD DAVIS AND ENID DAVIS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONERS

Of Counsel:
BART M. DAVIS
WEINPEL, WOOLF, JUST, COMBO & DAVIS
408 Shupe Avenue
Idaho Falls, ID 83402
(208) 524-5380

REX E. LEE *
CARTER G. PHILLIPS
GENE C. SCHAERR
KEVIN L. KIMBALL
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000
Counsel for Petitioners
* Counsel of Record

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REPLY BRIEF OF PETITIONERS

The Government does not seriously dispute that Section 170, like other tax provisions dealing with charitable contributions, must be construed liberally in favor of the taxpayer. Pet. Br. 14 (citing, *inter alia*, *Helvering* v. *Bliss*, 293 U.S. 144, 151 (1934)). The Government counters merely by citing a wholly irrelevant decision, which stands for the unremarkable proposition that *non*-charitable deductions are to be construed narrowly. See Govt. Br. 32 n.21 (citing *Commissioner* v. *National Alfalfa Dehy. & Milling Co.*, 417 U.S. 134, 149 (1974)).[1]

On the issue of how to interpret the precise language of Section 170, the Government's brief is a masterpiece of studied evasion and obfuscation. What appears to be the Government's principal argument—its "earmarking" analysis—assumes that the Church's missionary program is some kind of religious "study abroad" curriculum designed primarily for the benefit of the missionaries rather than the Church's proselyting efforts. That assumption, as well as the corollary assumption that petitioners' principal motive must have been to benefit their sons rather than the Church, is contradicted by extensive and un-

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[1] The Sixth Circuit explained these two lines of authority in *Weingarden* v. *Commissioner*, 825 F.2d 1027, 1029 (6th Cir. 1987):

> The general canon of construction is that statutes imposing a tax are interpreted liberally (in favor of the taxpayer). [citations omitted] But provisions granting a deduction or exemption are matters of legislative "grace" and are construed strictly (in favor of the government). [citations omitted] A special rule applies to charitable deductions, however, because these provisions are an expression of "public policy" rather than legislative grace. [citing *Helvering* v. *Bliss, supra*]. Provisions regarding charitable deductions should therefore be liberally construed in favor of the taxpayer.

Accord *Hartwick College* v. *United States*, 801 F.2d 608, 615 (2d Cir. 1986); *C.R. Mueller Co.* v. *Commissioner*, 190 F.2d 120, 122 (3d Cir. 1951); *Harrison* v. *Barker Annuity Fund*, 90 F.2d 286, 288 (7th Cir. 1937); *American Inst. for Economic Research* v. *United States*, 302 F.2d 934, 937 (Ct.Cl. 1962), *cert. denied*, 372 U.S. 976 (1963). No doubt for this reason, the Government claims no deference for its interpretation of Section 170.

disputed evidence, which, given the procedural posture of the case, must be read in the light most favorable to petitioners. At bottom, the Government's analysis merely begs the fundamental question whether petitioners' contributions are "for the use of" or "to" the Church.

In arguing that petitioners' contributions are not "for the use of" the Church, the Government attempts to rewrite the court of appeals' decision, disavowing the very legal theory that the Government itself successfully pressed in the courts below. The Government then attempts to sustain the court of appeals' judgment on two alternative grounds, one of which rests upon a novel and plainly erroneous reading of the statutory language, and the other of which conveniently ignores both the procedural posture of the case and the fact that the courts below applied what the Government now concedes was an improper legal standard.

The Government's argument that petitioners' contributions are not "to" the Church is similarly flawed. The Government's response to petitioners' "agency" theory assumes that Section 170 requires a deduction to be both "to" *and* "for the use of" a qualified charity, contrary to the statutory language. And its response to petitioners' argument under Treasury Regulation § 1.170A-1(g) rests upon a claim of "deference" to an interpretation of the regulation that, to petitioners' knowledge, has never been formally articulated by the Internal Revenue Service in this or any other case.

Finally, the Government's concerns about the administrative burden resulting from a decision in petitioners' favor are grossly overstated and, in any event, cannot properly limit the scope of Section 170.

A. The Government's "Earmarking" And "Indefiniteness" Arguments Are Irrelevant.

In this Court, the Government relies primarily upon an argument that has no basis in the language of Section 170. Citing the "indefinite beneficiaries" concept articulated in *Russell* v. *Allen*, 107 U.S. 163, 167 (1882), and a line of "earmarking" decisions by the lower courts, the Government claims (contrary to the implications of both opinions below, see Pet. App. 9a, 23a-24a) that no deduction would be allowed for petitioners' payments even if they were made directly to the Church but "earmarked" for petitioners' sons. Govt. Br. 13-14, 17-21. According to the Government, "it logically follows, *a fortiori*, that payments made *directly to an individual* cannot be deducted as 'to or for the use of' " the Church. Govt. Br. 19 (emphasis in original); see also Govt. Br. 36-37.

1. The Government's reliance upon the "indefinite beneficiaries" concept necessarily and incorrectly assumes that the missionaries are the beneficiaries of the Church's missionary program, and hence, of petitioners' donations. Thus, for example, the Government makes the wholly unsupported and astounding assertion (Govt. Br. 43 n.30) that, "[a]lthough the Church received some indirect benefit" from the payments at issue here, "the principal beneficiaries of the payments were individuals."

That assumption, which pervades the Government's entire argument, is flatly contrary to the evidence, which must be read in the light most favorable to petitioners. See Pet. Br. 29 n.15. That unchallenged evidence shows that the purpose of the Church's missionary program is to teach the doctrines of the Church to those who are not members of the Church. Indeed, that is why missionaries are expected to spend at least 10 hours per day in proselyting activities. See Pet. Br. 30a (affidavit of Elder Robert L. Backman); Brief of The Church of Jesus Christ of Latter-day Saints as *Amicus Curiae* at 7. The beneficiaries of that program are therefore not the missionaries, but the Church itself and the non-Church members the missionaries teach.[2] The benefi-

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[2] See, *e.g.*, J.A. at 5 ¶ 6 ("payments directly and primarily furthered and served the aims" of the Church); J.A. at 11 ¶ 10 ("Plaintiffs' primary motivation was to assist the Church's missionary program"); J.A. at 13 ¶ 19 (money received by missionary

ciaries of a missionary's support payments are also "indefinite" because neither the Church, the donor, nor the missionary knows which individuals will be taught from one day to the next, much less when the payments are made.

For these reasons, this case is fundamentally different from cases in which a taxpayer seeks to provide a benefit directly to someone who is already receiving services or other assistance from a qualified charity, *i.e.*, someone who is the direct and intended beneficiary of the organization's charitable work. See, *e.g.*, *Tripp* v. *Commissioner*, 337 F.2d 432, 436 (7th Cir. 1964) (university student); *Thomason* v. *Commissioner*, 2 T.C. 441, 443-45 (1943) (orphan). Here, by contrast, the Church's missionaries are *instruments* of the Church in rendering services to third parties; contributions like those at issue here merely enable the missionaries to render those services. See, *e.g.*, *Winn* v. *Commissioner*, 595 F.2d 1060 (5th Cir. 1979) (contribution deductible even though made to Presbyterian missionary's father to deposit in missionary's account); *Peace* v. *Commissioner*, 43 T.C. 1, 7-8 (1964) (contributions deductible even though earmarked for particular Presbyterian missionaries); *Lesslie* v. *Commissioner*, 36 T.C.M. (CCH) 495, 496 (1977) (contribution

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"should be spent wisely and only for missionary work"); J.A. at 16 ¶ 17 ("My Primary and overriding motive for serving on the mission was to provide services to my Church in accordance with my religious beliefs"); see also Brief of *Amicus Curiae* at 10-11.

To be sure, missionaries receive many of the incidental benefits realized by those who devote themselves to any selfless endeavor—character development, joy of service, and, in the case of missionaries, increased faith. But those benefits do not make the missionary the legal "beneficiary" of the Church's missionary service any more than the satisfaction received by the donor of a charitable gift makes the donor the beneficiary of his own gift. See, *e.g.*, 2 B. Bittker, *Federal Taxation of Income, Estates and Gifts* 35-10 (2d ed. 1990) ("the satisfaction of fostering a worthy cause . . . is not the kind of quid pro quo that disqualifies [a] contribution under § 170"); *McCollum* v. *Commissioner*, 37 T.C.M. (CCH) 1817, 1821 (1978).

deductible even though made directly to named missionary).

2. The corollary of the Government's assumption about the nature of the Church's missionary program is that petitioners' motive in making their contributions was to benefit their sons rather than the Church. Thus, the Government suggests that petitioners' contributions are analogous to sham "scholarships" that are designated *at the insistence of the donor* for a particular student, and for which the obvious motive is to benefit a particular individual rather than the charitable work of a qualified organization. See, *e.g.*, Govt. Br. 18, 36.

The Government's attack on petitioner's motive is rebutted by the undisputed evidence. As explained in their opening brief (Pet. Br. 34-35), petitioners testified that their motive was "a sincere religious desire to . . . support the Church's missionary program." Pet. App. 36a. Thus, their donations were "transferred to the missionaries because they were in fact missionaries (as opposed to being merely [petitioners'] sons)" (*id.*); the funds were "not intended for the sons to use as they might see fit" (*id.*); and petitioners "would not have provided the money to" their sons if "the sons had not been missionaries or if they had not agreed to use the money in accordance with Church instructions." Pet. App. 36a-37a. Most important, and unlike the "scholarship" examples cited by the government, petitioners sent their contributions directly to their sons rather than to the Church because the Church, for its own religious reasons, asked them to do so. See Pet. App. 2a, 31a-32a, 36a; see also Brief of *Amicus Curiae* at 5, 12-13.[3]

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[3] This fact distinguishes this case from most cases in which a taxpayer seeks to provide support for someone who is arguably an instrument in the organization's charitable work, such as a university professor or an officer of a charitable foundation. Cf. Govt. Br. 21 n.14. It is very rare that such an organization will have any legitimate reason for requesting that contributions be sent directly to—

3. At bottom, the Government's "earmarking" analysis is a "red herring" that sheds no light on the deductibility of petitioners' contributions. *First*, the premise of the Government's entire argument—that a *gift* must be given to an "indefinite" beneficiary to be considered "to or for the use of" a qualified donee—is plainly erroneous. That crucial premise rests entirely upon a play on words: The Government begins by correctly observing (Govt. Br. 13-14) that an *organization* must benefit an indefinite group of beneficiaries to be a qualified "public charity" under common law principles and, therefore, under Section 501 of the Code. *E.g.*, *Russell* v. *Allen*, 107 U.S. 163, 167 (1882) (*charitable trust* must be "for the benefit of an indefinite number of persons"); see also *Bob Jones University* v. *United States*, 461 U.S. 574, 585-92 (1983) (discussing common-law roots of Section 501). But the Government then twists that language to argue that any *act* of "public charity" by an individual (see Govt. Br. 14, 20) also must benefit an indefinite group of beneficiaries to be "to" or "for the use of" the qualified organization under Section 170. There is nothing to support that argument.

Second, the government's reliance on what it refers to as the "earmarking cases" (Govt. Br. 17, 19), merely begs the question whether petitioners' payments were

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or earmarked for—its employees, and that such an arrangement can therefore be said to be "for the use of" the organization.

The Government also uses its "earmarking" argument as a vehicle for suggesting that deduction of petitioners' contributions is somehow improper because those contributions were used primarily to pay for "food, shelter, and transportation" (Govt. Br. 21), which are considered nondeductible "personal or living expenses" under I.R.C. § 262. But the regulations under Section 262 expressly exempt from the general rule of non-deductibility any expenses, including personal and living expenses, that are deductible under Section 170. Treas. Reg. § 1.262-1. Indeed, the Government acknowledges (Govt. Br. at 21 n.14) that a contribution used to pay such expenses would be deductible if the contribution were made, without earmarking, to the Church in the first instance. The allegedly "personal" nature of the expenses covered by petitioners' contributions is therefore irrelevant.

either "to" or "for the use of" the Church. In fact, the Government draws upon two distinct lines of authority, neither of which is properly grounded in the broad "indefiniteness" concept the Government advances. Decisions denying a deduction for earmarked donations placed in the possession of a qualified charity—the true "earmarking" cases—are actually based upon a sham rationale: In those cases, the qualified charity is merely being used as a "conduit" for channelling gifts to some third party. The individual, not the charity, is the object of the gift. The gift, therefore, cannot properly be said to be made "to" the charity within the meaning of Section 170. *E.g.*, *Tripp* v. *Commissioner*, 337 F.2d 432, 436 (7th Cir. 1964) (scholarship payments actually a "contribution to an individual" rather than to charity); cf. *Peace* v. *Commissioner*, 43 T.C. 1, 7-8 (1964) (contributions earmarked for particular missionaries "to" Church rather than missionaries). On the other hand, decisions denying a deduction for payments placed in the possession of someone other than the qualified donee (which involve no earmarking) do so on the ground that the gifts are in reality "for the use of" someone other than the qualified charity. *E.g.*, *Thomason* v. *Commissioner*, 2 T.C. 441, 443-45 (1943) (payments for use of orphan, not orphanage); *Davenport* v. *Commissioner*, 34 T.C.M. (CCH) 1585, 1588 (1975) (rent payments "for the use of" taxpayer's son, not church). But, as the Government grudgingly recognizes (Govt. Br. 18-21), both lines of authority—including administrative decisions by the IRS—uniformly *permit* the deduction of contributions earmarked for or sent directly to a third party, as long as the contribution benefits the charity and the charity has sufficient control over the use of the donated funds that the contribution can reasonably be said to be either "to" or "for the use of" the organization rather than the individual.[4]

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[4] *E.g.*, *Winn* v. *Commissioner*, 595 F.2d 1060, 1065 (5th Cir. 1979) (contributions earmarked for single missionary); *Peace* v. *Commissioner*, *supra*, 43 T.C. at 7-8 (contributions earmarked for particular missionaries); *Brinley* v. *Commissioner*, 782 F.2d 1326,

The Government's "earmarking" analysis thus ends where it begins, with the question whether the contributions at issue here are "to" *or* "for the use of" the Church.[5] Except to the extent it shows that the Church must benefit from and have some degree of control over those contributions (which it unquestionably does), the Government's analysis sheds no light on the answers to those fundamental questions.

B. The Court Of Appeals Erroneously Held That Petitioners' Contributions Are Not "For The Use Of" The Church As A Matter Of Law.

1. Petitioners previously established (Pet. Br. 16-23) that the courts below were in error in holding that a charity must acquire possession of a contribution made "for the use of" rather than "to" the charity. The Government now concedes that actual possession by a qualified charity is not required. It acknowledges (Govt. Br.

1331 (5th Cir. 1986) (payment directly to individual Mormon missionary); *Bauer* v. *United States*, 449 F. Supp. 755, 759 (W.D. La. 1978), *aff'd*, 594 F.2d 44 (5th Cir. 1979) (scholarship funds given to individual students); Rev. Rul. 70-519, 1970-2 C.B. 62 (contributions earmarked for specific boy in "big brother" program); Rev. Rul. 69-473, 1962-2 C.B. 37 (contribution directly to specific unwed mother); Rev. Rul. 66-10, 1966-1 C.B. 47 (contribution directly to specific disaster victim).

On several occasions, the Government has attempted to convince the courts to adopt a rule of *per se* non-deductibility for *all* earmarked donations, but every such attempt has been rebuffed. *E.g.*, *Peace* v. *Commissioner*, 43 T.C. 1, 7-8 (1964) (rejecting IRS argument that contributions earmarked for certain missionaries nondeductible merely because they were made for the support of "certain specified individuals").

[5] The Government's earmarking analysis plainly does not support the legal theory on which the Ninth Circuit granted summary judgment, *i.e.*, that possession is a necessary condition of deductibility under Section 170, even when the taxpayer is claiming a deduction for a payment made "for the use of" rather than "to" the charity. Indeed, the Government now disclaims that theory. See Govt. Br. 30 n.20; *infra* pp. 9-10. The cases on which the Government relies do establish that possession is not always sufficient, but they provide no support for the notion that possession is always necessary.

30 & n.20) that it is "apparent from the face of the statute . . . that Section 170 covers some transfers that are not made directly 'to' the actual possession of a qualified donee." However, the Government argues (*id.* n.20) that "the court of appeals never formulated" a contrary holding, and that petitioners have merely "demolish[ed] a straw man." The Government's argument not only distorts the decisions below, but also ignores the Government's own prior position in this and other cases.

Before the district court, the Government argued that the court should apply "an objective control test; viz., whether or not the qualified donee had full control of the payments." United States Memorandum Supporting Its Motion For Summary Judgment at 6 (D. Id. Mar. 27, 1987). According to the Government, "th[is] full control test provides objective assurance that the payments will be used for the intended charitable purpose because the charity *receives and controls* the funds." *Id.* at 7 (emphasis added). The Government had previously, but unsuccessfully, advanced this very theory before the Fifth Circuit in *Brinley* v. *Commissioner*, 782 F.2d 1326, 1331 (5th Cir. 1986).

The district court adopted the Government's theory. It held that the Government's "full control test" is the proper standard for determining whether a payment is "for the use of" a qualified donee, and that this test is satisfied only when "the charity has *sufficient possession* of the contribution so that it has discretion as to the use to which the donated funds will be put." Pet. App. 24a (emphasis added). In short, the district court held that possession is a necessary but not a sufficient condition for deductibility.

Before the court of appeals, the Government again pressed the "full control test" it had successfully advanced in the district court. Brief for the Appellee at 21 (9th Cir. Feb. 4, 1988). Under that test, according to the Government, "[i]t is controlling that the LDS Church never took *possession* of the funds in question,

and thus had no opportunity to exercise discretion as to whom they would be provided to or how they would be spent." *Id.* at 40 (emphasis added). The court of appeals also adopted the Government's theory, holding that no deduction is available when "the charity never *possesses* the funds, let alone controls their use. . . ." Pet. App. 9a (emphasis added); see also Pet. App. 15a (Section 170 "does not provide for a deduction by a taxpayer who does not . . . make a contribution directly to the charity").

It is thus clear beyond argument that the basis on which the district court granted summary judgment—and the basis on which the court of appeals affirmed that judgment—was the Government's own theory that possession by the Church is a necessary (although not a sufficient) condition for a contribution to be "for the use of" the Church. Because the Government now concedes that this theory is incorrect, petitioners are entitled, at a minimum, to a reversal and remand for application of the proper legal standard.

2. Petitioners previously proposed two alternative standards, each of which is consistent with the language, structure and legislative history of Section 170: First, because "for the use of" is a term of art denoting any arrangement in which one person conveys money or property to a fiduciary to hold or employ for the benefit of a third person (see Pet. Br. 17-20), a taxpayer need establish only that he gave a contribution to someone in a fiduciary capacity for the benefit of a qualified charity (*id.* at 11, 24).[6] Second, "for the use of" could be read,

[6] The Government repeatedly mischaracterizes petitioners' fiduciary standard by suggesting that petitioners read "for the use of" as "authorizing deductions for all payments to individuals that might incidentally benefit qualifying organizations." Govt. Br. 8; see also Govt. Br. 7, 29-32, 35. The "hypotheticals" discussed by the Government (Govt. Br. 30-32, 34)—as well as the Government's bluster about the catastrophic effects of a decision in petitioners' favor (Govt. Br. 10, 15-16, 42-43)—all rest upon the Government's mischaracterization of petitioners' proposal. Under petitioners' theory, however, no deduction could be taken in any of the Government's hypotheticals unless the taxpayer could establish that a fiduciary relationship existed and that the qualified organization was the principal, intended beneficiary of that relationship. See, *e.g.*, Pet. Br. 24.

as the Fifth Circuit did in *Brinley* v. *Commissioner*, 782 F.2d 1326 (5th Cir. 1986), to imply a "purposive control" standard, *i.e.*, a requirement that the charity have sufficient control to ensure, as a practical matter, that the contribution will serve primarily the charity's own purposes rather than benefit primarily the donor or some other party. Pet. Br. 11, 23, 25-27; Note, *Earmarked Charitable Contributions: In Search of a Standard*, 50 Mo. L. Rev. 918, 927-29 (1985); Note, *A Tax Deduction For Direct Charitable Transfers: The Case Against Davis* v. *United States, 861 F.2d 558 (9th Cir. 1988)*, 64 Wash. L. Rev. 935, 946-50 (1989).

The Government rejects both of these interpretations. The Government first contends (Govt. Br. 27-29) that "for the use of" means "in trust for." But the Government apparently recognizes that petitioners have presented sufficient evidence to create, at a minimum, a triable issue of fact on the question whether petitioners' missionary sons received petitioners' contributions in trust for the Church. See Pet. Br. 29 n.14.[7] Thus, the Government adopts an even more restrictive reading of the statutory language. It argues that, because the direct impetus for adding the words "for the use of" to Section 170 came from institutional trusts that (according to the Government) merely held funds "for eventual distribution

[7] The affidavit of petitioner Harold Davis, among other evidence, establishes (a) the existence of a trust *res*, *i.e.*, petitioners' contributions; (b) that the Church was the intended beneficiary of petitioners' payments; and (c) an expression by the petitioners that their contributions were to be held for the benefit of the Church—all of the elements of a trust. Pet. Br. 28-29 & n.14. That affidavit as well as other undisputed evidence also establishes that petitioners' sons accepted their fiduciary obligations. See J.A. at 13 n.20 ("[t]he missionaries had made a commitment with [petitioners] to use the money for which a deduction is claimed only in accordance with the Church's instructions"); see also *supra* note 2.

to a qualifying charity" (Govt. Br. 29), a contribution satisfies the statutory requirement only when it is made to an institutional, "intermediary" trust. See Govt. Br. 11, 27. This interpretation is incorrect for three reasons:

First, it finds no support in the plain language of the statute. Petitioners have already demonstrated that the phrase "for the use of," as a legal term of art, is broader than "in trust for." Pet. Br. 17-20. The Government does not seriously dispute that analysis or offer any evidence to the contrary.[8] If Congress had meant "in trust for," it could easily have used those very words. And if it had meant to limit the statute further to institutional, "intermediary" trusts (Govt. Br. 28) (which are commonly called "passive trusts," see G. Bogert, *The Law of Trusts and Trustees*, § 207 at 43-44 (rev. 2d ed. 1984), it could easily have said that as well. Moreover, even if the impetus for amending Section 170 had come only from institutional "intermediary" trusts, that would be no basis for limiting the reach of the statute in the manner suggested by the Government. Decisions of this Court clearly establish that a statute is not to be limited to the particular problem that gave rise to it if its language extends beyond that problem.[9]

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[8] The Government's interpretation of "for the use of" relies upon a definition of the *verb* "to use" rather than the *noun* "use." Rather than citing the primary synonyms for the noun "use"—*i.e.*, "service," "advantage," "profit" and "account,"—the Government erroneously relies upon the primary synonyms of the verb "use"—*i.e.*, "employ" and "utilize." Govt. Br. 25. Moreover, the very dictionary cited by the Government also defines "use" as "the *benefit* in law of one or more persons." *Webster's Third New International Dictionary* 2523 (1986) (emphasis added). See Pet. Br. 23-24.

[9] See, *e.g.*, *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287-89 (1976) (42 U.S.C. § 1981, though enacted "for further relief of the constitutionally emancipated former Negro slaves," applies in discrimination claim filed by white employees because statutory language prohibits discrimination against "all persons"); *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 109 S.Ct. 2893, 2903-04 (1989) (although "[o]rganized crime was without a doubt Congress' major target" in enacting RICO, Court could not "accept this argument for a narrowing construction of the Act's expansive terms"); *Sutherland Stat. Const.* § 49.02 at 348 (4th ed. 1984) (" 'It is a general rule in the construction of statutes that legislative enactments in general and comprehensive terms . . . apply to persons, subjects and businesses within their general purview and scope . . . where the language fairly includes them,' " quoting *Cain* v. *Bowlby*, 114 F.2d 519, 522 (10th Cir.), *cert. denied*, 311 U.S. 710 (1940)).

Second, the historical assumption underlying the Government's position—*i.e.*, that the particular problem Congress was attempting to solve in adding "for the use of" to Section 170 was limited to institutional, "intermediary" trusts—is belied by the very legislative history cited by the Government. The Government relies heavily upon a passage in the Senate testimony of William Greenough, a representative of the New York Community Trust. Govt. Br. 26 & n.18. Yet, the Government selectively omits portions of that testimony which show that Congress was concerned with the impact of the pre-existing law on institutional *and* individual trustees, and that it understood the new statutory language to include both.[10]

Third, the government's interpretation of "for the use of" is completely at odds with long-standing judicial and administrative interpretations. Numerous courts have

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[10] The portions of Mr. Greenough's testimony excised by the Government are underlined:

> Our whole request here is that the sections of the income tax be made harmonious with this provision [of the estate tax allowing deductions for gifts to trustees in trust for qualified donees]. There seems to be no reason in the nature of things, if a gift to a corporation organized exclusively for religious, charitable, scientific, and these other related purposes should be exempt from the estate tax, why a gift to trustees, either *individually* or corporate, for precisely similar purposes should not also be exempt. That in itself is absolutely all we are asking for . . . ; that is to say, where a donor during his life time wants to make a charitable gift either to an *individual* who is trustee for some charitable purpose or to a trust company who is trustee for some charitable purpose, he may do so and the exemption will be allowed.

Hearings on H.R. 8245 Before the Senate Comm. on Finance, 67th Cong., 1st Sess. 530 (1921) (emphasis added).

permitted deduction of a contribution "for the use of" a charitable organization without requiring that the contribution be placed in the hands of an institutional or "intermediary" trustee, or indeed, any trustee at all.[11] The IRS itself for many years held that unreimbursed expenses directly attributable to the performance of voluntary services for a qualified donee were "for the use of" that donee (see Pet. Br. 22 & n.8), even though such contributions obviously are not made through any trustee, let alone an institutional or "intermediary" trustee. Indeed, the IRS Chief Counsel observed in a brief to the Tax Court as recently as 1981 that "[m]any payments other than payments to a trust are payments 'for the use of charity.'" Respondents' Brief in Answer, Tax Court No. 9356-77, at 14 (citing cases) (previously lodged in this Court). The Government cites no judicial or administrative decisions in support of its new interpretation of the statutory language.

3. The Government also appears to argue (Govt. Br. 32-35) that, even if "for the use of" is not limited to contributions made to institutional, "intermediary" trustees, petitioners have nonetheless failed to establish that the Church had sufficient control to justify a deduction. This argument is misplaced for at least two reasons:

First, the Government conveniently ignores the fact that the district court has not yet held a trial on the question of control. The Government, moreover, while apparently disagreeing with the control standard advanced by petitioners and applied by the Fifth Circuit in *Brinley*, studiously avoids articulating any theory or standard by which a court could determine the sufficiency of the Church's control. But unless (as the courts below incorrectly held) the Church must have control amounting to "posesssion of the contribution" (Pet. App. 24a), petitioners plainly have presented sufficient evidence to create a triable question of fact on the control issue under any plausible theory or standard. See Pet. Br. 6-8, 28-30 (summarizing evidence). The Government's repeated efforts to read the factual record in the light most favorable to its own position (Govt. Br. 2-6, 32-35) is improper at this stage of the litigation. Moreover, the Government's heavy reliance upon what it repeatedly and incorrectly characterizes as the lower courts' "findings" on the control question (see Govt. Br. 6, 7, 22, 23, 30, 33) is plainly misplaced,[12] particularly given the Government's concession that the courts below applied the wrong legal standard (see *supra* 9-10).

Second, the Government's arguments rest upon a mischaracterization of petitioners' control argument. Petitioners do not contend, as the Government implies (Govt. Br. 33-35) that the control requirement is satisfied if the Church possesses "front-end" *or* "back-end" control over the contributions. Like the Fifth Circuit in *Brinley*, petitioners contend that any control requirement implicit in the phrase "for the use of" is satisfied by substantial front-end *and* back-end control. The Church plainly has substantial front-end control, as evidenced by the fact that it requests the funds, specifies the amounts to be contributed, and, most important, controls the manner in which the funds are to be paid (*i.e.*, whether they are to be sent directly to the missionary or to the Church). See Pet. Br. 6-8, 30; *supra* at 5.[13] The Church also has substantial back-end control resulting from its extraordinary control over missionaries' day-to-day activities, its

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[11] *E.g.*, *Brinley* v. *Commissioner*, 782 F.2d 1326, 1331 (5th Cir. 1986); *Winn* v. *Commissioner*, 595 F.2d 1060, 1065 (5th Cir. 1979); *Bauer* v. *United States*, 449 F. Supp. 755, 758 (W.D. La. 1978), *aff'd*, 594 F.2d 44 (5th Cir. 1979); *SICO Found.* v. *United States*, 295 F.2d 924, 930 (Ct.Cl. 1961); *Archbold* v. *United States*, 444 F.2d 1120, 1122 (Ct.Cl. 1971); *Morey* v. *Riddell*, 205 F. Supp. 918, 921 (S.D. Cal. 1962).

[12] It is well established that the grant of summary judgment is in all respects subject to *de novo* review. 6 J. Moore, *Moore's Federal Practice* ¶ 56.27[1] at 56-852 (1988). See also Pet. Br. 29 n.15.

[13] The Church's front-end control is further enhanced by its selection and assignment of its missionaries, and by the clear understanding among all concerned that the missionary is to use the

financial guidelines, and its reporting requirements. See Pet. Br. 6-8, 30; Brief of *Amicus Curiae* at 6-7, 22-23.[14]

C. The Court Of Appeals Erroneously Held That Petitioners' Contributions Are Not "To" The Church As A Matter Of Law.

1. Petitioners previously demonstrated, based upon the evidence in the record, that missionaries are agents of the Church both for the purpose of teaching the Church's beliefs to those in the missionary's mission area (Pet. Br. 38-39), and for the limited purpose of accepting funds donated to support them in their missionary labors, up to the amounts specified by the Church (Pet. Br. 39-40). Because petitioners' donations were made to authorized agents of the Church, they were "to" the Church within the plain meaning of Section 170. Pet. Br. 38-42; see also Brief of *Amicus Curiae* at 6 n.11. Aside from its "earmarking" argument (see *supra* 3-8), the Government's only response is that, even if petitioners sons were agents of the Church duly authorized to accept the payments at issue, "[t]he question remains whether [those] payments[s] for their son's support [are] deductible as 'for the use of' the Church." Govt. Br. 37. But this argument is obviously contrary to the language of the statute because it assumes that any such donation must be "to *and* for the use of" the qualified donee, rather than "to *or* for the use of" the donee.[15]

2. Petitioners also demonstrated (Pet. Br. 30-37) that their donations are contributions "to" the Church because

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funds only to facilitate his or her missionary services on behalf of the Church. See Pet. Br. 3-4, 6-8.

[14] Like the decisions below, the Government's one-sided analysis of the evidence (Govt. Br. 34) simply ignores several of the most important sources of the Church's control over the contributions at issue, including the Church's control over the manner in which payments are made and its control over the missionaries' activities. See Pet. Br. 6-8, 40 & n.21.

[15] To be sure, a taxpayer seeking a deduction under an agency theory must demonstrate that the charitable organization has sufficient control to prevent the agency relationship from being a mere "sham." See *supra* 7. But it need not demonstrate the same level of control required for deduction of a donation made to a non-agent "for the use of" a charitable organization. See *supra* 14-16. Because petitioners have established sufficient control to satisfy the latter requirement, they have necessarily established sufficient control for a genuine agency relationship.

they are "unreimbursed expenditures" under Treasury Regulation § 1.170A-1(g). The Government's principal response—that Regulation (g) "permits a deduction only by the taxpayer who both incurs the expense and performs the service" (Govt. Br. 39)—is incorrect for two reasons:

First, as the Government acknowledges (Govt. Br. 39-40), the language of the regulation is not so limited. Indeed, its language stands in marked contrast to that of its predecessor, which was *expressly* limited to expenses incurred in connection with the taxpayer's own services. See Rev. Rul. 55-4, 1955-1 C.B. 291; Govt. Br. 40. The Government is thus reduced to arguing (Govt. Br. 39-40) that such a limitation is somehow implicit in the language of the present regulation. But the Government itself recognizes (Govt. Br. 40-41 n.28) that its position is contrary to numerous decisions of the courts of appeals and the Tax Court.[16] The Government also invokes the principle that a court should defer to "the Commissioner's interpretation of his own regulation." Govt. Br. 39. But the Government cites no revenue ruling or other deci-

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[16] Indeed, *Brinley* v. *Commissioner*, 782 F.2d 1326, 1332 (5th Cir. 1986) reversed a decision of the Tax Court on this very point. See also *White* v. *United States*, 725 F.2d 1269, 1271-72 (10th Cir. 1984); *Rockefeller* v. *Commissioner*, 676 F.2d 35 (2d Cir. 1982); *McCollum* v. *Commissioner*, 37 T.C.M. (CCH) 1817 (1978); *Smith* v. *Commissioner*, 60 T.C. 988 (1973). Although conceding that *Rockefeller*, *McCollum*, and *Smith* permitted a deduction for expenses incurred by non-taxpayers, the Government (Govt. Br. 41 n.28) argues that "it does not appear . . . that the court's attention was called" to that fact. But the failure of the Internal Revenue Service to raise the issue in those cases merely underscores the novelty of the interpretation advanced by the Government here.

sion—in this case or elsewhere—in which the Internal Revenue Service itself (as opposed to its counsel) has articulated the interpretation now advanced by the Government. See, *e.g.*, *SEC* v. *Chenery*, 318 U.S. 80 (1947).

Second, as the Tenth Circuit concluded in *White* v. *United States*, 725 F.2d 1269, 1271 (10th Cir. 1984), there is "no rational basis" for such a limitation. The benefit bestowed on the Church as a result of a missionary's service is the same whether that service is financed by the missionary himself or by someone else. See Pet. Br. 32-35; Brief of *Amicus Curiae* at 16. The Government, moreover, does not dispute that businesses are routinely permitted to take deductions for expenses incident to the rendition of services by third parties. See Pet. Br. 36 n.20. The Government's only policy justification for its proposed limitation on Regulation (g) is that petitioners' interpretation would permit "deductions . . . to be shifted from the sons to the parents." Govt. Br. 42. But this justification begs the very question at issue, *i.e.*, whether a taxpayer is entitled to deduct expenses incurred in connection with charitable services rendered by someone else. See Pet. Br. 37.[17]

[17] The Government's additional argument (Govt. Br. 43 n.30) that petitioners do not satisfy the "primary benefit" requirement is not only contradicted by substantial evidence in the record (see *supra* 3-6), which must be read in the light most favorable to petitioners, but is also contrary to every judicial decision that has addressed that question in the context of the Church's missionary program. See *White* v. *United States*, 725 F.2d at 1272; *Brinley* v. *Commissioner*, 782 F.2d at 1331-32, 1336. The Government's suggestion that the Church receives only an "indirect benefit" (Govt. Br. 43 n.30)—comparable to the benefit received by a university from the scholarly pursuits of its students (Govt. Br. 30-31)—is utterly absurd when considered in light of the undisputed fact (Pet. App. 43a) that missionaries typically spend between 50 and 70 hours per week actively proselyting on behalf of the Church.

D. The Government's Administrative Convenience Arguments Are Misplaced.

As previously discussed (*supra* note 7), the Government's general assertions about the administrative burden to the IRS of a decision in petitioners' favor (see Govt. Br. 10, 15-16, 42-43) rest upon a mischaracterization of petitioners' interpretation of the statutory phrase, "for the use of." And, as explained in petitioners' opening brief (Pet. Br. 42-43), the Government's specific assertions are utterly groundless.[18] In any event, those concerns are more properly addressed to Congress, which has expressly permitted a deduction for contributions made to third parties "for the use of" as well as "to" a qualified organization. The plain language of Section 170 cannot properly be narrowed solely to serve the administrative convenience of the IRS. See, *e.g.*, *Commissioner* v. *Duberstein*, 363 U.S. 278, 290 (1960).

In fact, any additional administrative burden created by a decision in petitioners' favor would be minimal. To determine the deductibility of any particular contribution, the IRS would merely need to verify (a) that the recipient was, in fact, a missionary during the relevant period, and (b) that the amount of the claimed deduction is within the Church's guidelines for that mission during that period. The taxpayer, of course, would have the burden of proof on both issues. Given the small amounts of money involved and the Church's own incentive to keep missionary expenses to a minimum (see Pet. Br.

[18] As previously noted (*supra* 18), the Government's "deduction shifting" argument (Govt. Br. 42) is wholly circular. See also Pet. Br. 43. And the Government's "double deduction" argument assumes (a) that the missionary, who spends virtually all of his or her time proselyting and is not allowed to work, will have sufficient outside income to need a charitable contribution deduction; and (b) that missionaries and their parents will be dishonest in their tax returns. The first assumption, however, is rarely satisfied in practice, and the second proves too much: the only way to avoid abuse arising from simple dishonesty would be to eliminate charitable deductions altogether. See also Pet. Br. 43.

6-7), there would be no need to examine the missionary's expenditures.[19] But, even if the IRS felt it necessary to examine those expenditures, that task would be no different from the auditing task it would face if the funds came from the Church itself. Given the uniqueness of the Church's missionary program, moreover, there is no realistic possibility that a favorable decision could lead to abuse by other taxpayers. In short, the additional administrative burden to the IRS of a decision in petitioners' favor is trivial by comparison to the substantial burden to the Church of an adverse ruling in this case. See Pet. Br. 45; Brief of *Amicus Curiae* at 20-22.

CONCLUSION

For the reasons stated above and in petitioners' opening brief, the judgment below should be reversed.

Respectfully submitted,

Of Counsel:
BART M. DAVIS
WEINPEL, WOOLF, JUST, COMBO & DAVIS
408 Shupe Avenue
Idaho Falls, ID 83402
(208) 524-5380

REX E. LEE *
CARTER G. PHILLIPS
GENE C. SCHAERR
KEVIN L. KIMBALL
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000
Counsel for Petitioners
* Counsel of Record

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[19] There is no basis for the Government's apparent concern (Govt. Br. 33 n.22) that the Church might set the guidelines at abusively high levels, thereby permitting substantially larger deductions than those at issue here. The IRS could easily challenge any deduction in excess of basic food, lodging and transportation expenses as being "for the use of" the individual missionary rather than the Church. But the Government does not—and could not—contend that the amounts at issue here are in any way excessive.